In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1895

STATE OF TEXAS, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

As petitioners recognize (Pet. 10), this petition, seeking certiorari before judgment in the court of appeals, presents "essentially the same" issues as *Train* v. *City of New York*, No. 73-1377, and *Train* v. *Campaign Clean Water, Inc.*, No. 73-1378, certiorari granted, April 29, 1974. The issue is whether under Section 207 of the Water Pollution Control Act Amendments of 1972, the Administrator of the Environmental Protection Agency has discretion to allot among the states amounts less than the total Congress has authorized to be appropriated under those amendments.

Petitioners are five states who have brought suit challenging the Administrator's action in allotting $2 billion for fiscal year 1973 and $3 billion for fiscal 1974; the statute authorizes appropriations for sewage treat-

ment plants for those two fiscal years of "not to exceed" $5 billion and $6 billion. The district court concluded that "the Administrator has a mandatory duty to allot * * * the sums authorized by Congress in Section 207 of the Act" (Pet. App., p. 24), granted summary judgment in favor of each of the petitioners, and ordered the Administrator to allot to each its *pro rata* share (Pet. App., pp. 27-36).

The Administrator appealed to the Court of Appeals for the Fifth Circuit, which heard oral argument on April 29, 1974, the date that this Court granted certiorari in *City of New York* and *Campaign Clean Water*. The court of appeals subsequently advised counsel for the parties that it would withhold its disposition of the appeal pending this Court's decision in those cases (Pet. App., pp. 39-40).[1]

Petitioners seek review prior to judgment in the court of appeals to enable this case to be heard with the *City of New York* and *Campaign Clean Water* cases. We submit, however, that all the issues that petitioners raise can be fully and adequately considered in those two cases, and that there is no occasion for this Court to bypass the normal appellate processes to hear the additional cases at this time. See Rule 20 of the Rules of this Court. Indeed, petitoners have already filed an *amicus* brief in those cases.

Petitioners contend certiorari before judgment should be granted because "the record in the instant case contains evidence on the impact of the Administrator's impoundment action on the States" which would be "of assistance to the Court in judging the important legal issues raised

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[1]On June 17, 1974, this Court stayed the district court's orders pending disposition of the appeal by the Fifth Circuit.

in this controversy" (Pet., p. 11). We disagree with their characterization of the record in this case. Three of the five petitioner states—Texas, Wisconsin and Missouri—filed affidavits in support of their motions for summary judgment which showed waste treatment construction "needs" and potential projects that exceeded their allotments. These affidavits did not show, however, that the proposed projects would meet the Administrator's criteria for grant approval, or that potential grantees were prepared to fund their share (25 percent) of such projects.

In any event, as shown in our brief in *City of New York* and *Campaign Clean Water*, the reduction in allotments has not significantly reduced the rate of obligation and subsequent expenditure under this program with respect to any states or territories covered by the Amendments. As of May 31, 1974, not all of the sums allotted in November 1972 had been obligated by any jurisdiction, and substantially all the $4 billion allotted by the Administrator in January 1974 remained available for obligation (Pet. Brief, Nos. 73-1377 and 73-1378,

pp. 6-7; and Appendix, Table I).[2] Accordingly, the factual record here would not aid the Court in resolving the legal issues raised in this controversy.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[2]Figures for the five petitioner states, as extracted from Table I, are as follows:

State/territory	Allotments	Obligations	Percent obligated
Kansas			
Fiscal year 1973	7,484,000	5,842,030	78
Fiscal year 1974	11,226,000	———	—
Fiscal year 1975	40,192,500	600,000	1
Missouri			
Fiscal year 1973	33,112,000	30,401,300	91
Fiscal year 1974	49,668,000	———	—
Fiscal year 1975	74,546,400	7,940,620	11
Oklahoma			
Fiscal year 1973	9,216,000	8,049,375	87
Fiscal year 1974	13,824,000	4,302,135	31
Fiscal year 1975	46,997,400	———	—
Texas			
Fiscal year 1973	55,388,000	55,347,224	99
Fiscal year 1974	83,082,000	4,734,761	5
Fiscal year 1975	106,900,250	———	—
Wisconsin			
Fiscal year 1973	34,830,000	6,790,650	19
Fiscal year 1974	52,245,000	57,375	—
Fiscal year 1975	52,360,400	———	—

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